

1 Christopher C. Moscone, SBN 170250
2 Jordan M. Otis, SBN 276274
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
5 San Francisco, CA 94104
6 Tel. (415) 362-3599
7 Fax: (415) 362-2006

8 Attorneys for Plaintiff
9 LAURENCE VINOUCUR

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 LAURENCE VINOUCUR,

13 Plaintiff,

14 v.

15 STIHL INCORPORATED; TASCO
16 CORPORATION; and DOES 1 – 100,
17 inclusive,

18 Defendants.

Case No. CGC-15-546749

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANTS STIHL
INCORPORATED AND TASCO
CORPORATION**

(Health & Safety Code § 25249.5 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur”) and defendants STIHL Incorporated (“STIHL”) and Tasco Corporation (“Tasco”)
5 (collectively “Defendants”), with Plaintiff and Defendants each referred to individually as a “Party”
6 and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Plaintiff is a resident of the State of California who seeks to promote awareness of
9 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
10 substances contained in consumer and commercial products.

11 **1.3 Defendants**

12 STIHL and Tasco each employ ten or more persons and each is a person in the course of
13 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”). Tasco manufactures
15 certain hearing protection products covered by this Consent Judgment. STIHL buys certain hearing
16 protection products from Tasco, and then distributes and sells into California certain of the hearing
17 protection products covered by this Consent Judgment.

18 **1.4 General Allegations**

19 1.4.1 Plaintiff alleges that Defendant Tasco manufactured sold and/or distributed
20 for sale in California, hearing protection products with vinyl/PVC ear cushions or ear plugs
21 containing one or more of Di(2-ethylhexyl)phthalate (“DEHP”), Diisononyl phthalate (“DINP”),
22 and Di-isodecyl phthalate (“DIDP”) (collectively the “Covered Proposition 65 Chemicals”), that
23 expose users to the Covered Proposition 65 Chemicals, without providing the clear and reasonable
24 health hazard warnings required by Proposition 65. Plaintiff alleges that Defendant STIHL sold
25 and/or distributed for sale in California hearing protection products manufactured by Tasco for
26 STIHL, and containing one or more of the Covered Proposition 65 Chemicals, that expose users to
27 the Covered Proposition 65 Chemicals without providing the clear and reasonable health hazard
28 warnings required by Proposition 65.

1 **1.5 Product Description**

2 The category of products covered by this Consent Judgment are hearing protection products
3 manufactured by Tasco, some with vinyl/PVC ear cushions or ear plugs, including, but not limited
4 to, Professional Hearing Protection, identified as STIHL SKU #000-866-0402, Tasco SKU # 230-
5 02555, UPC #7 95711 13304 7 (hereinafter the “Covered Products”).

6 **1.6 Notices of Violation**

7 On October 24, 2014, Plaintiff served STIHL and certain requisite public enforcement
8 agencies with 60-Day Notices of Violation (“Notice”) alleging that STIHL violated Proposition 65
9 when it failed to warn customers and consumers in California that the Covered Products expose
10 users to DEHP.

11 On March 13, 2015, Plaintiff served STIHL and Tasco, and certain requisite public
12 enforcement agencies, with a Supplemental 60-Day Notice of Violation (“Supplemental Notice”),
13 alleging that STIHL and Tasco violated Proposition 65 when they failed to warn customers and
14 consumers in California that the Covered Products expose users to DEHP.

15 On April 29, 2015, Plaintiff served STIHL and Tasco, and certain requisite public
16 enforcement agencies, with a Second Supplemental 60-Day Notice of Violation (“Second
17 Supplemental Notice”), alleging that Defendants violated Proposition 65 when they allegedly failed
18 to warn customers and consumers in California that the Covered Products, including, but not
19 limited to, Professional Hearing Protection, UPC #7 95711 13304 7 (Tasco SKU # 230-02555;
20 STIHL SKU # 000-866-0402) expose users to DEHP, DINP and DIDP, referred to herein as the
21 “Covered Proposition 65 Chemicals”.

22 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
23 prosecuting the allegations set forth in the Notice, Supplemental Notice or Second Supplemental
24 Notice.

25 **1.7 Complaint**

26 On July 8, 2015, Plaintiff commenced the instant action by filing a complaint
27 (“Complaint”), naming each of the Defendants as a defendant, and asserting a cause of action for
28

1 the alleged violations of Proposition 65 that are the subject of the Notice, Supplemental Notice, or
2 Second Supplemental Notice.

3 **1.8 No Admission**

4 STIHL and Tasco deny each and every material, factual, and legal allegation contained in
5 the Notice, Supplemental Notice, Second Supplemental Notice and Complaint and maintain that all
6 of the products they have sold or distributed for sale in California, including the Covered Products,
7 have been and are in compliance with all laws. Nothing in this Consent Judgment shall be
8 construed as an admission by Defendants of any fact, finding, conclusion of law, issue of law, or
9 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
10 admission by Defendants of any fact, finding, conclusion of law, issue of law, or violation of law.
11 This Section shall not, however, diminish or otherwise affect Defendants' obligations,
12 responsibilities, and duties under this Consent Judgment.

13 **1.9 Consent to Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
15 jurisdiction over STIHL and Tasco as to the allegations contained in the Complaint, that venue is
16 proper in the County of San Francisco, and that the Court has jurisdiction to enter and enforce the
17 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
18 Procedure section 664.6 as a resolution of disputed allegations in this matter.

19 **2. DEFINITIONS**

20 **2.1 California Customer**

21 "California Customer" shall mean any customer of either defendant that Defendants
22 reasonably understand are located in California, have a California warehouse or distribution center,
23 maintain a retail outlet in California, or have distributed Covered Products for sale in California,
24 online via the internet or by any other means.

25 **2.2 Reformulated Products**

26 "Reformulated Products" shall mean Covered Products that contain no more than 1000 parts
27 per million ("ppm") (0.1%) of any of the Covered Proposition 65 Chemicals in any material,
28 component, or constituent of a Covered Product, when analyzed by a laboratory accredited by

1 NVLAP (National Volunteer Laboratory Accreditation Program), American Association for Lab
2 Accreditation (A2LA), ANSI-ASQ National Accreditation Board (ANAB) – ACLASS brand (an
3 ANAB company), International Accreditation Service, Inc. (IAS), Laboratory Accreditation Bureau
4 (L-A-B), Perry Johnson Laboratory Accreditation, Inc. (PJLA), or International Laboratory
5 Accreditation Cooperation(ILAC) (such laboratory referred to as an “Accredited Lab”) pursuant to
6 EPA testing methodologies 3580 and 8270C, or equivalent methodologies utilized by such
7 Accredited Laboratory or federal or state agencies to determine the presence, or measure the
8 amount, of the Covered Proposition 65 Chemicals in a solid substance (such methodologies referred
9 to as “Approved Methodologies”).

10 **2.3 Effective Date**

11 “Effective Date” shall mean the date the Court enters this Consent Judgment.

12 **3. INJUNCTIVE RELIEF: REFORMULATION**

13 **3.1 Reformulation Commitment**

14 Commencing on the Effective Date, and continuing thereafter, Defendant Tasco shall not
15 manufacture for distribution or sale to California Customers for sale in California, or cause to be
16 manufactured for distribution or sale to California Customers for sale in California, any Products
17 that are not Reformulated Products.

18 **4. MONETARY PAYMENTS**

19 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

20 In settlement of all the claims referred to in this Consent Judgment, and as provided below,
21 Defendant Tasco shall pay a sum of up to \$16,000 as civil penalties, on behalf of itself and STIHL.
22 STIHL has no obligation to pay any fine or civil penalty. The civil penalty payment will be
23 allocated in accordance with California Health & Safety Code section 25249.12(c)(1) and (d), with
24 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
25 (“OEHHA”), and 25% of the penalty remitted to “Laurence Vinocur, Client Trust Account.” The
26 civil penalty payment shall be delivered on the date due as set forth below at the addresses provided
27 below. Tasco shall be liable for payment of simple interest at a rate of 10% for all amounts due and
28 owing that are not received within two business days after the date they are due, if any.

1 **4.1.1 Initial Civil Penalty**

2 Within ten (10) business days after the Effective Date, Tasco shall make an initial civil
3 penalty payment of \$6,000. Tasco shall pay the \$6,000 civil penalty in two checks, one for \$4,500
4 to OEHHA and the other for \$1,500 to “Laurence Vinocur, Client Trust Account,” which shall be
5 delivered in accordance with Section 4.4 below.

6 **4.1.2 Second Civil Penalty**

7 Within 180 days after the Effective Date, Tasco shall make a second civil penalty payment
8 of \$10,000 unless waived and forever discharged as follows. The second civil penalty payment
9 shall be waived and forever discharged if Tasco provides Plaintiff with certification that, within 30
10 days after the Effective Date and continuing thereafter, all Covered Products manufactured for sale
11 in California are Reformulated Products. Tasco will not thereafter manufacture for distribution or
12 sale to California Customers for sale in California, or cause to be manufactured for distribution or
13 sale to California Customers any Products that are not Reformulated Products. An officer or other
14 authorized representative of Tasco shall provide Plaintiff with a written certification confirming
15 compliance with this condition within 60 days after the Effective Date. The option to provide a
16 written certification in lieu of making the second civil penalty payment constitutes a material term
17 of this Consent Judgment, and with regard to such term, time is of the essence.

18 **4.2 Reimbursement of Fees and Costs**

19 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
20 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
21 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
22 other settlement terms had been finalized, Defendants expressed a desire to resolve Plaintiff’s
23 outstanding fees and costs. Under general contract principles and the private attorney general
24 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
25 through the mutual execution of this agreement, including the fees and costs incurred as a result of
26 investigating, bringing this matter to Defendants’ attention, negotiating a settlement in the public
27 interest, and seeking court approval of this Consent Judgment. On behalf of itself and STIHL, and
28 cognizant of its status as a small family-owned company, Tasco agrees to pay Plaintiff’s fees and

1 costs in the amount of \$38,000 in three equal payments on the following schedule: \$12,666,67
2 within ten (10) business days after the Effective Date, (2) \$12,666,67 within thirty (30) business
3 days after the first payment, and (3) \$12,666,67 within thirty (30) business days after the second
4 payment.

5 **4.3 Payment Procedures**

6 **4.3.1 Payment Addresses.**

7 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
8 4.1 and 4.2 shall be delivered to the following address:

9 Moscone Emblidge Sater & Otis LLP
10 Attn: Proposition 65 Coordinator
11 220 Montgomery Street, Suite 2100
12 San Francisco, CA 94104

13 (b) All payments owed to OEHHA, pursuant to Section 4.1, shall be
14 delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of the following addresses, as
15 appropriate:

16 For United States Postal Service Delivery:

17 Mike Gyurics
18 Fiscal Operations Branch Chief
19 Office of Environmental Health Hazard Assessment
20 P.O. Box 4010
21 Sacramento, CA 95812-4010

22 For Non-United States Postal Service Delivery or Courier:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 1001 I Street
27 Sacramento, CA 95814

28 **4.3.2 Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
shall be mailed, simultaneous with payment, to Moscone Emblidge Sater & Otis at the address set
forth in Section 4.3.1(a) above.

4.3.3 Tax Documentation. Defendant Tasco shall provide a separate 1099 form
for each payment required by this Consent Judgment to: (a) Plaintiff, whose address and tax
identification number shall be furnished upon request after this Consent Judgment has been fully

1 executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment”; and
2 (c) Moscone Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment
3 addresses provided in Section 4.3.1, above.

4 **5. CLAIMS COVERED AND RELEASED**

5 **5.1 Plaintiff’s Release of Proposition 65 Claims**

6 Plaintiff, acting on his own behalf and in the public interest, releases Defendants Tasco and
7 STIHL and their respective parents, subsidiaries, affiliated entities under common ownership,
8 directors, officers, agents, employees, attorneys, and each entity to whom Defendants directly or
9 indirectly distribute or sell the Covered Products, or have ever directly or indirectly distributed or
10 sold the Covered Products, including, but not limited to, all downstream distributors, wholesalers,
11 customers, retailers, cooperative members, and licensees, including, but not limited to, STIHL’s
12 independent downstream distributors, independent dealers that sell STIHL-branded products, and
13 customers of any kind or type, (collectively, “Releasees”), from all claims alleging violations of
14 Proposition 65 based on unwarned exposures to the Covered Proposition 65 Chemicals in Covered
15 Products manufactured through the Effective Date for distribution or sale in California.
16 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
17 with respect to exposures to the Covered Proposition 65 Chemicals in the Covered Products, as set
18 forth in the Notice, the Supplemental Notice and the Second Supplemental Notice.

19 **5.2 Plaintiff’s Individual Releases of Claims**

20 Plaintiff, in his individual capacity only and *not* in any representative capacity, releases
21 Releasees herein, which shall be effective as a full and final accord and satisfaction, as a bar to all
22 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
23 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
24 unsuspected, limited to and arising out of alleged or actual exposures to any or all of the Covered
25 Proposition 65 Chemicals in the Covered Products manufactured through the Effective Date for
26 distribution or sale in California.

27 **5.3 Plaintiff’s Section 1542 Waiver**

1 With respect to the matters covered by this Consent Judgment, Plaintiff acknowledges that
2 he is familiar with Section 1542 of California Civil Code, which provides as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
4 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
5 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
6 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
7 SETTLEMENT WITH THE DEBTOR.

8 Plaintiff, in his individual capacity only and *not* in any representative capacity, expressly waives
9 and relinquishes any and all rights and benefits which he may have under, or which may be
10 conferred on him by the provisions of Civil Code Section 1542.

11 **5.4 Defendants' Release of Plaintiff**

12 Defendants, on their own behalf, and on behalf of their past and current agents,
13 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
14 Plaintiff and his attorneys and other representatives, through the Effective Date, for any and all
15 actions taken or statements made (or those that could have been taken or made) by Plaintiff and his
16 attorneys and other representatives, whether in the course of investigating claims, otherwise seeking
17 to enforce Proposition 65 against it in this matter, or with respect to the Covered Products.

18 **6. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved in its entirety and entered by the
20 Court and shall be null and void if, for any reason, it is not approved and entered by the Court
21 within one year after it has been fully executed by all Parties. Plaintiff and Defendants agree to
22 support the entry of this agreement as a Consent Judgment and to obtain approval of the Consent
23 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
24 Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
25 Consent Judgment, which motion Plaintiff shall draft and file and Defendants shall support,
26 appearing at the hearing if so requested. If any third-party objection to the motion is filed, Plaintiff
27 and Defendants agree to work together to file a reply and appear at any hearing. This provision is a
28 material component of the Consent Judgment and shall be treated as such in the event of a breach.

1 If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to
2 whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course
3 of action to take, then the case shall proceed in its normal course on the Court’s trial calendar. If
4 the Court’s approval is ultimately overturned by an appellate court, the Parties shall meet and
5 confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly
6 agree on a course of action to take, then the case shall proceed in its normal course on the Court’s
7 trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently
8 overturned by any appellate court, any monies that have been provided to OEHHA, Plaintiff or his
9 counsel pursuant to Section 4, above, shall be refunded within 15 days after the appellate decision
10 becomes final.

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of California
13 without reference to its conflict of laws provisions. In the event that Proposition 65 is repealed,
14 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Covered
15 Products, then Defendants may provide Plaintiff with notice of any asserted change in the law, and
16 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
17 extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be
18 interpreted to relieve Defendants from their obligation to comply with any pertinent state or federal
19 law or regulation.

20 **8. NOTICES**

21 Unless specified herein, all correspondence and notices required to be provided pursuant to
22 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
23 registered or certified mail, return receipt requested; or (iii) a recognized overnight courier to any
24 Party by the other at the following addresses:
25
26
27
28

1 To Defendant Tasco:

To Plaintiff:

2 Sean T. Scanlon
3 President, Tasco Corporation
4 37 Tripps Lane
5 Riverside, Rhode Island 02915

Attn: Proposition 65 Coordinator
Moscone Emblidge Sater & Otis LLP
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

6 Jon L Benjamin, Esq.
7 Farella, Braun + Martel, LLP
8 235 Montgomery Street
9 San Francisco, CA 94104

10 To Defendant STIHL:

11 Kristian Williams
12 STIHL Incorporated
13 536 Viking Drive
14 Virginia Beach, Virginia 23452

Bethany Gayle Lukitsch, Esq.
McGuireWoods LLP 800 E. Canal Street
Richmond, VA 23219

15 Any Party, from time to time, may specify in writing to the other Party a change of address to
16 which all notices and other communications shall be sent.

17 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

18 This Consent Judgment may be executed in counterparts and by facsimile or portable
19 document format (pdf) signature, each of which shall be deemed, and as valid as, an original, and
20 all of which, when taken together, shall constitute one and the same document.

21 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

22 Plaintiff and his counsel agree to comply with the reporting form requirements referenced in
23 California Health and Safety Code section 25249.7(f).

24 **11. MODIFICATION**

25 This Consent Judgment may be modified only: (i) by written agreement of the Parties and
26 upon entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion
27 of any party and entry of a modified Consent Judgment by the Court. Any Party(s) seeking to
28

1 modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party(s)
2 prior to filing a motion to modify the Consent Judgment.

3 **12. AUTHORIZATION**


4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective Parties and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

7 **13. FULL SETTLEMENT**

8 The Parties intend for this Consent Judgment to constitute a full and final settlement of this
9 matter, and that it should be entered as a final judgment.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:



Plaintiff Laurence Vinocur

AGREED TO:

Jon A. Dilorio, Vice President
Defendant
Tasco Corporation

Dated: 7/9/15_____

Dated: _____

and

B. Scott Tilley, General Counsel
Defendant
STIHL Incorporated

Dated: _____

1 modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party(s)
2 prior to filing a motion to modify the Consent Judgment.

3 **12. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective Parties and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

7 **13. FULL SETTLEMENT**

8 The Parties intend for this Consent Judgment to constitute a full and final settlement of this
9 matter, and that it should be entered as a final judgment.


10

11 **AGREED TO:**

AGREED TO:

12

13 _____
14 Plaintiff Laurence Vinocur


15 _____
16 Jon A. DiIorio, Vice President
17 Defendant
18 Tasco Corporation

16 Dated: _____

Dated: 7/9/2015

17

18

19

20

and

21

22

23 _____
24 B. Scott Tilley, General Counsel
25 Defendant
26 STIHL Incorporated

25

26 Dated: _____

27

28

1 modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party(s)
2 prior to filing a motion to modify the Consent Judgment.

3 **12. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective Parties and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

7 **13. FULL SETTLEMENT**

8 The Parties intend for this Consent Judgment to constitute a full and final settlement of this
9 matter, and that it should be entered as a final judgment.

11 **AGREED TO:**

AGREED TO:

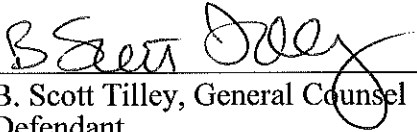
13 _____
14 Plaintiff Laurence Vinocur

Jon A. DiIorio, Vice President
Defendant
Tasco Corporation

16 Dated: _____

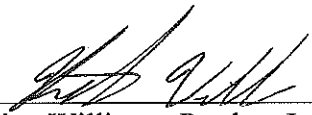
Dated: _____

20 and

22 
23 B. Scott Tilley, General Counsel
24 Defendant
STIHL Incorporated

26 Dated: 7/15/15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Kristian Williams, Product Information
Manager
Defendant
STIHL Incorporated

Dated: 7/15/15